No. 95-1145

Supreme Court, U.S.
FILED
1996
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ISMAEL R. DIAZ, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals correctly concluded that: (1) the harmful error provision of 5 U.S.C. 7701(c)(2)(A) applies to performance-based removals under 5 U.S.C., Ch. 43; and (2) the agency did not fail to inform petitioner of the performance standards applicable to him and of what he needed to accomplish for a successful performance rating.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 63 F.3d 1107. The order of the Merit Systems Protection Board (Pet. App. 9a-11a) denying the petition for review is unpublished, but the decision is noted at 65 M.S.P.R. 509 (Table). The initial opinion of the Merit Systems Protection Board (Pet. App. 12a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on October 17, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 16, 1996 (the Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a GS-13 Chemist in the Directorate of Aerospace Fuels Management at Kelly Air Force Base, Texas. On January 28, 1993, and again on April 16, 1993, petitioner was put on a performance improvement plan and afforded an opportunity to improve his work performance because of his unacceptable performance level. On October 26, 1993, petitioner received a notice of proposed removal based upon his unacceptable performance. On February 2, 1994, petitioner was issued a final decision removing him from his position with the Air Force. Pet. App. 4a-5a.

2. Pursuant to 5 U.S.C. 4303(c)(1), a decision regarding a proposed removal "shall be made within 30 days after the date of expiration of the notice period." Petitioner was informed of his proposed removal on October 26, 1993, triggering the start of a notice period of 30 days (see 5 U.S.C. 4303(b)(1)) that expired on November 25, 1993. Pet. App. 6a. Petitioner's removal on February 2, 1994, occurred more than 30 days after the expiration of the notice period. *Ibid.*

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). In the MSPB's initial decision, an administrative judge sustained the Air Force's decision to remove petitioner based upon his unacceptable performance. Pet. App. 37a. In

addition, the administrative judge concluded that, although petitioner's removal more than 30 days after the expiration of the notice period constituted a procedural violation, petitioner had failed to establish that he had been harmed by the error as required by 5 U.S.C. 7701(c)(2)(A). Pet. App. 42a. On November 18, 1994, the MSPB denied petitioner's petition for review. *Id.* at 9a-10a.

3. The court of appeals affirmed the MSPB's decision. Pet. App. 4a-8a. The court concluded that the harmful error standard of 5 U.S.C. 7701(c)(2)(A) applies to performance-based removals pursuant to 5 U.S.C., Ch. 43. Pet. App. 7a-8a. In addition, the court rejected petitioner's claim that the Air Force had not adequately communicated the performance standards for his employment. *Id.* at 8a. The court of appeals denied petitioner's request for rehearing with a suggestion for rehearing *in banc*. *Id.* at 1a-2a.

ARGUMENT

The court of appeals correctly concluded that the harmful error standard of 5 U.S.C. 7701(c)(2)(A) applies to performance-based removals made pursuant to 5 U.S.C., Ch. 43. The court also correctly rejected petitioner's argument that the Air Force did not adequately communicate to petitioner the performance standards for his employment and the actions necessary to meet those standards.

1. In enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), Congress established a new performance appraisal system that provided for dismissal based upon unacceptable performance. 5 U.S.C., Ch. 43; see also S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978). As part of that legislative reform, Congress also created

three affirmative defenses for employees challenging removals:

> (2) Notwithstanding paragraph (1) [setting forth minimum evidentiary showings an agency must make for a decision to be sustained], the agency's decision may not be sustained under subsection (b) of this section [detailing appeal process] if the employee or applicant for employment—
>
> > (A) shows harmful error in the application of the agency's procedures in arriving at such a decision;
> >
> > (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
> >
> > (C) shows that the decision was not in accordance with law.

5 U.S.C. 7701(c)(2).

The MSPB has correctly interpreted Section 7701(c)(2)(A) as providing that procedural errors committed in a performance-based employment action are not a basis for reversing an agency action unless the employee demonstrates that he or she was harmed by the error. See, *e.g.*, *Parker* v. *Defense Logistics Agency*, 1 M.S.P.R. 505, 512-513 (1980). In *Handy* v. *USPS*, 754 F.2d 335, 338 (Fed. Cir. 1985), the Court of Appeals for the Federal Circuit held that harmful error analysis applies to conduct-based removals pursuant to 5 U.S.C., Ch. 75.[1] Prior to the present

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[1] "Chapter 75 covers 'adverse personnel actions'—removal, suspension, furlough, reduction in grade and pay—taken to

case, the court of appeals had not specifically addressed whether Section 7701(c)(2)(A) necessitates harmful error analysis for procedural errors in performance-based removals under 5 U.S.C., Ch. 43 as well, but the court had applied such an analysis in a performance-based removal case in *Martin* v. *FAA*, 795 F.2d 995, 999 (Fed. Cir. 1986).

The legislative history surrounding the enactment of the CSRA supports the conclusion that Congress intended to apply a harmful error standard to procedural violations in both Chapter 75 (conduct-based) and Chapter 43 (performance-based) removal proceedings: "In enacting the Civil Service Reform Act of 1978, Congress declared that [the reviewing] court should reverse agency actions for procedural error 'only if the procedures followed substantially impaired the rights of the employees.'" *Brewer* v. *USPS*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 64 (1978)); see also *Adams* v. *Department of Transp.*, 735 F.2d 488, 496 (Fed. Cir.) (Nies, J., concurring), cert. denied, 469 U.S. 1018 (1984); *Baracco* v. *Department of Transp.*, 15 M.S.P.R. 112, 119-120 (1983), aff'd *sub nom. Adams* v. *Department of Transp.*, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Parker*, 1 M.S.P.R. at 512-513. Nothing in Section 7701(c)(2), which provides for appeals of agency decisions, differentiates between performance-based removals pursuant to Chapter 43

'promote the efficiency of the service' (i.e., involving employee misconduct). 5 U.S.C. §§ 7503, 7513 (1988)." *Bosco* v. *United States*, 931 F.2d 879, 883 (Fed. Cir. 1991).

and conduct-based removals pursuant to Chapter 75. See 5 U.S.C. 7701(c)(2).[2]

2. Petitioner contends (Pet. 12-21) that issuance of his removal decision more than 30 days after the expiration of the notice period rendered that decision "not in accordance with law" in violation of 5 U.S.C. 7701(c)(2)(C). Petitioner relies upon the mandatory nature of the term "shall" in 5 U.S.C. 4303(c) to argue that the procedural violation here rendered the removal decision unlawful. In *Brock* v. *Pierce County*, 476 U.S. 253 (1986), similar mandatory language directed that the Secretary of Labor "shall" issue a final determination within 120 days. *Id.* at 256. Despite the mandatory nature of that language, this Court concluded that the Secretary did not lose jurisdiction to issue a determination outside the specified period because Congress had not established any penalty for failure to conform to the time requirement and had not stated that the Secretary could not act beyond the statutory time period. *Id.* at 266.

Petitioner maintains (Pet. 8-9) that this Court's decision in *Brock* is distinguishable, because Congress provided a penalty for violations of the statutory notice period when it enacted the affirmative defenses contained in Section 7701(c)(2). Petitioner argues that Congress intended that any failure to comply with the notice period renders an agency action not in accordance with the law and, therefore, subject to a Section 7701(c)(2)(C) objection.

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[2] As the MSPB noted, the procedural violation actually worked to petitioner's benefit in this case by effectively extending the time within which he might improve his performance. Pet. App. 41a-42a.

Petitioner's argument disregards the context of Section 7701(c)(2). The harmful error provision contained in subsection (A), which specifically covers "error[s] in the application of the agency's procedures," would be effectively negated on petitioner's reading, because any decision involving a procedural violation—whether harmful or not—would require reversal as a decision "not in accordance with law." Petitioner's argument would thus effectively hold that a procedural violation is harmful *per se*, removing the employee's statutory burden of proving the harm of any error resulting from a procedural violation. See *Handy*, 754 F.2d at 336-337; *Adams*, 735 F.2d at 496 (Nies, J., concurring).[3]

3. Petitioner also argues (Pet. 12-21) that his removal more than 30 days after the expiration of the notice period constituted a prohibited personnel practice, which, pursuant to Section 7701(c)(2)(B), may not be sustained on appeal. 5 U.S.C. 7701(c)(2)(B).

This argument parallels petitioner's argument concerning the "not in accordance with law" defense and should be rejected for the same reasons. Petitioner's interpretation would automatically convert all violations of procedural statutes, rules, or regulations into prohibited personnel practices requiring reversal of agency decisions. Employees would not have to demonstrate harmful error arising from an

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[3] The court of appeals' interpretation of the statute, on the other hand, preserves a sphere of operation for Section 7701(c)(2)(C). See, *e.g.*, *Hamilton* v. *USPS*, 58 M.S.P.R. 486 (1993) (agency's demotion action is "not in accordance with law" where decision letter was signed by deciding official four days after she retired and thus had no legal authority to demote agency employees; decision must be made by agency official).

agency's procedural irregularity; rather, the procedural violation of a statute, rule, or regulation would, on petitioner's reading, always constitute a prohibited personnel practice in violation of Section 2302(b)(11). As noted above, however, the legislative history accompanying the enactment of the CSRA emphasizes that agency actions should be reversed for procedural violation only if "the procedures followed substantially impaired the rights of the employees." *Brewer*, 647 F.2d at 1097, quoting S. Rep. No. 969, 95th Cong., 2d Sess. 64 (1978).

4. Finally, petitioner argues (Pet. 19-20) that the agency failed to inform him of his performance standard and what specifically he needed to improve in order to meet that standard, and that this asserted failure constituted a prohibited personnel practice. The MSPB, however, found that the Air Force had informed petitioner of his performance standards and what he needed to do in order to meet them. Pet. App. 17a-18a. The board's findings were supported by substantial evidence and were properly affirmed by the court of appeals. *Id.* at 8a. Further review of that factual matter is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996